

119 FERC ¶ 61,228
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Downeast LNG, Inc.

Docket No. CP07-52-000

Downeast Pipeline, LLC

Docket Nos. CP07-53-000
CP07-54-000
CP07-55-000

ORDER DENYING MOTION TO SUSPEND PROCEEDINGS

(Issued June 1, 2007)

1. On February 26, 2007, the Province of New Brunswick, Canada (New Brunswick) filed a motion requesting that the Commission suspend processing of the applications filed by Downeast LNG, Inc. (Downeast LNG) and Downeast Pipeline, LLC (Downeast Pipeline) for authorizations to construct and operate liquefied natural gas (LNG) and take-away pipeline facilities in Washington County, Maine. For the reasons discussed herein, the Commission is denying New Brunswick's motion.

I. Background

2. On December 22, 2006, Downeast LNG filed an application in Docket No. CP07-52-000 seeking authorization under section 3 of the Natural Gas Act (NGA) for the siting, construction, and operation of an LNG receiving terminal at Mill Cove in Washington County, Maine. Concurrently, Downeast Pipeline filed an application in Docket No. CP07-53-000, *et al.*, seeking, *inter alia*, authorization under section 7 of the NGA to construct, own, and operate pipeline facilities to transport regasified LNG from Downeast LNG's proposed terminal to an interconnection with Maritimes & Northeast

Pipeline, L.L.C.¹ The proposed transit route for LNG tankers to the proposed LNG terminal would straddle the U.S.-Canadian boundary and also pass through Canadian waters in Head Harbour Passage and Passamaquoddy Bay.

3. On February 26, 2007, New Brunswick filed its motion requesting that the Commission suspend its administrative review of the proposed Downeast LNG terminal and take-away pipeline projects. In its motion to suspend, New Brunswick references a February 14, 2007 letter from the Canadian Ambassador to the United States, Michael H. Wilson, to Commission Chairman Joseph T. Kelliher. Ambassador Wilson's letter stated that, based on a study commissioned by the federal government of Canada, the Canadian government has decided that it will not permit LNG tankers to pass through Head Harbour Passage to the proposed Downeast LNG terminal because such tanker traffic would present unacceptable environmental and navigational risks to southwest New Brunswick and its inhabitants.² New Brunswick asserts that the Commission should suspend its review of the Downeast LNG terminal project because it is no longer viable in view of the Canadian Government's decision.

4. Answers opposing New Brunswick's motion to suspend were filed by the Maine State Planning Office on March 12, 2007, and by Downeast LNG and Downeast Pipeline (jointly Downeast) on March 13, 2007. On March 13, 2007, *Nulankeyutomonen Nkihtahkomikumon* (We Take Care of Our Land),³ Save Passamaquoddy Bay-Canada,

¹ Notice of Downeast LNG's and Downeast Pipeline's applications was issued on December 29, 2006, and published in the *Federal Register* on January 8, 2007 (72 Fed. Reg. 766). Comments and motions to intervene were due January 22, 2007. All of the pleadings addressed by this order were filed by parties that filed timely, unopposed motions to intervene, which are granted by operation of Rule 214 of the Commission's Rules of Practice and Procedure. 18 C.F.R. § 385.214 (2006).

² In a letter dated March 2, 2007, Chairman Kelliher responded to Ambassador Wilson's letter, explaining that the Commission acts primarily as a safety agency and therefore requesting a copy of the Canadian study so that it could be incorporated into the Commission's record and safety review of the proposed facilities. Chairman Kelliher also stated that because the applications for the proposed Downeast LNG terminal and pipeline project have not been withdrawn, Commission staff is continuing to prepare an environmental impact statement to address the environmental impacts and the maritime safety and security of the project, as currently proposed.

³ *Nulankeyutomonen Nkihtahkomikumon* (We Take Care of Our Land) states that its members are members of the Passamaquoddy Tribe, several of whom reside in the proposed Downeast LNG project area in Maine, specifically on Pleasant Point in Maine and in nearby towns in Canada.

Inc.,⁴ and Save Passamaquoddy Bay-U.S.⁵ (jointly Three-Nation Alliance) filed an answer supporting New Brunswick's motion.

5. On March 23, 2007, the Three-Nation Alliance filed a motion for leave to reply to Downeast's March 13, 2007 answer. On April 3, 2007, Downeast filed a response in opposition to the Three-Nation Alliance's March 23, 2007 answer. The Commission will admit these answers to ensure a complete record.⁶

II. Discussion

6. New Brunswick states that it is a smaller Canadian province with limited means, and it, therefore, is concerned about the likely costs of required studies and analyses to assess the potential impacts of the proposed Downeast LNG project. New Brunswick asserts that there is no need for it and other parties to expend resources on this matter when the Canadian government already has decided that it will not permit LNG tankers to pass through Canadian waters to reach the proposed LNG terminal, making the proposed project not viable. Therefore, New Brunswick argues that the Commission should suspend processing of the applications for the Downeast LNG project. The Three-Nation Alliance supports New Brunswick's position.

7. Downeast acknowledges that the inability of LNG tankers to transit Canadian waters would affect the viability of the project. However, Downeast argues that it is premature to conclude that LNG tankers will not be allowed to use Canadian waters to access the proposed terminal. The Maine State Planning Office also states that suspension of the Commission's proceedings at this time is unnecessary and unreasonable.

⁴ Save Passamaquoddy Bay-Canada states that several of its members reside in the project area in New Brunswick in St. Andrews, Deer Island, Grand Manan Island and surrounding areas, and that it was formed, in part, for the purpose of opposing construction of LNG facilities on Passamaquoddy Bay.

⁵ Save Passamaquoddy Bay-U.S. states that several of its members reside in the project area in Maine in Eastport, Perry and Robbinston and surrounding areas, and that it was formed, in part, for the purpose of opposing construction of LNG facilities on Passamaquoddy Bay.

⁶ Rule 213(a) of the Commission's Rules of Practice and Procedure provides that no answer may be made to an answer unless otherwise ordered by the decisional authority. 18 C.F.R. § 385.213(a) (2006).

8. While Downeast and the Three-Nation Alliance disagree on whether the Canadian government can deny LNG tankers passage through Head Harbour Passage and Passamaquoddy Bay to reach Downeast's proposed LNG terminal, they agree that this issue can be resolved only by mutual accord or by an international tribunal with appropriate jurisdiction.⁷ In any event, the Commission recognizes that such issues of international law are beyond its purview. However, the Commission does not agree with New Brunswick and the Three-Nation Alliance that the Commission should exercise its discretion to suspend these proceedings on the Downeast LNG applications because issues relating to LNG tanker passage through Canadian waters have not yet been resolved. There is a vital need for additional imported LNG supplies to meet increased demands for natural gas from all consuming sectors.⁸ Therefore, the Commission will continue its review of the proposed Downeast LNG project and preparation of an environmental impact statement so that the project can proceed in a timely manner if issues relating to LNG tanker passage through Canadian waters are favorably resolved and the Commission finds, after thoroughly reviewing all environmental and safety matters, that approval of the project is in the public interest.

9. In response to New Brunswick's concerns regarding its costs to perform studies and participate in these proceedings, the Commission emphasizes that it welcomes the involvement of New Brunswick and any Canadian agency regarding environmental,

⁷ The pleadings filed on March 13, 2007, by the Three-Nation Alliance and Downeast present opposing arguments on the issue of whether a decision by the Canadian government to deny permission for LNG vessels to transit Passamaquoddy Bay to reach Downeast's proposed LNG terminal would constitute a violation of international law.

⁸ See, e.g., *Dominion Cove Point LNG, LP*, 115 FERC ¶ 61,337 at P 126 (2006) (citing International Gas Association of America's *An Updated Assessment of Pipeline and Storage Infrastructure for the North American Gas Market: Adverse Consequences of Delays in the Construction of Natural Gas Infrastructure*, July 2004). See also *Natural Gas Interchangeability*, 115 FERC ¶ 61,325 at P 11 (2006) (citing National Petroleum Council's *Balancing Natural Gas Policy: Fueling the Demands of a Growing Economy*, Volume 1, Summary of Findings and Recommendations, September 2003, at 64).

navigational, or safety concerns, and we will continue to seek their input.⁹ The Commission will thoroughly consider any information it receives and will conduct any additional studies or analyses needed in view of such information. The United States Coast Guard will address all relevant marine safety concerns in its Waterway Suitability Report (WSR) to determine the suitability of the proposed vessel route for accommodating the type and frequency of LNG traffic that would be associated with Downeast's proposed LNG terminal project. The Commission will also continue working with the United States Department of State, which is assisting the Commission's staff and the United States Coast Guard, to address Canadian concerns regarding the project.

10. For the above reasons, the Commission is denying New Brunswick's motion to suspend processing of the applications for the Downeast LNG project, and the Commission's staff will continue to evaluate the environmental, security, safety, and navigational effects of the project. The Commission continues to encourage Canadian agencies with relevant responsibilities to assist the Commission staff and the United States Coast Guard as they continue their analyses.

The Commission orders:

(A) New Brunswick's motion to suspend proceedings is denied.

(B) The answers filed on March 23, 2007 by the Three-Nation Alliance and Downeast are accepted.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

⁹ On June 19, 2006, during the pre-filing proceedings on the Downeast LNG project in Docket No. PF06-13-000, *et al.*, the Commission's staff sent letters providing information and requesting comments and participation by the Canadian Coast Guard, Maritimes Services; Environment Canada, Provincial Manager; Transport Canada, Marine Safety; Compliance and Enforcement Transport; Fisheries and Oceans Canada; and Foreign Affairs Canada. Copies of each letter were sent to the Honorable Michael Wilson, Canadian Ambassador to the United States, and the Honorable Bernard Lord, Premier of the Province of New Brunswick.